EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECEIVED
SEP 16 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JASPER DARDEN,
Petitioner,
v.
LOUIE L. WAINWRIGHT
Respondent.

CASE NO. 85-~~5139~~ 5319

EXTRAORDINARY
MOTION TO DISSOLVE STAY OF EXECUTION AND
SUGGESTION THAT WRIT WAS IMPROVIDENTLY GRANTED

On September 3, 1985, the Court, voting five-to-four, denied an application for stay of execution filed on behalf of petitioner, Darden. Subsequent to that denial, the Federal District Court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit likewise denied applications for stay of execution.

Petitioner then requested this Court to treat the previously filed application for stay of execution as a petition for writ of certiorari. The Court then granted the petition, vacated its previous order denying the application for stay, and stayed the execution of the sentence of death pending judgment of this Court.

Now that respondent has had the first opportunity to review and study both the application and the respective orders of this Court, respondent is compelled, not only to move to dissolve the stay of execution, but also to offer the suggestion that the granting of the writ of certiorari was improvidently done. Because of the unusual action of the Court, respondent submits that this pleading is appropriate and that its filing is not without precedent. See, Chambers v. Mississippi, 405 U.S. 1205 (1972) (POWELL, J., in chambers).

Five members of the Court are of the belief that none of the claims contained in the petition for certiorari is possessed of any merit. JUSTICE POWELL recognized this fact, but nevertheless voted to stay the execution sentence because four

Justices voted to grant certiorari and, due to the nature of the case and the geographical scattering of all Justices, JUSTICE POWELL joined in the granting of the application for a stay. It is respectfully submitted that this action was produced by the pressure created by petitioner's last minute effort and perhaps because of this, wrought in oversight of established legal standards.

In perhaps the first writing of JUSTICE POWELL on the subject, the general standards governing the grant of a stay application were stated as follows: there must be a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritoricus for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decisions; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Graves v. Barnes, 405 U.S. 1201 (1972) (POWELL, J., in chambers). These notions were specifically repeated in Times-Picayune Publishing Corporation v. Schulingkamp, 419 U.S. 1301 (1974) (POWELL, J., in chambers) and relied upon by JUSTICE STEVENS in Williams v. Zbaraz, 442 U.S. 1309 (1979) (STEVENS, J., in chambers).

The question of ultimate resolution of the merits of the case has been considered by several Justices of the Court in varying contexts. In denying an application for stay in Corsetti v. Massachusetts, ___ U.S. ___, 104 S.Ct. 10 (1982) (BRENNAN, J., in chambers), JUSTICE BRENNAN provided a two-step process for considering applications for stays. The first was determining whether the so-called "rule-of-four" would be satisfied, and the second was prognosticating whether there was a "fair prospect that a majority of the Court would conclude the decision below was erroneous". Id., at 4 (emphasis added). Predicting the final outcome of the case is a mandatory function. Heckler v. Lopez, ___ U.S. ___, 104 S.Ct. 10 (1983) (REHNQUIST, J., in chambers). The rule-of-four reflects the policy of granting a stay only when the losing party

presents substantial contentions which are likely to prevail on the merits. Holtzman v. Schlesinger, 414 U. S. 1304 (1973) (MARSHALL, J., in chambers). It has been said that the predicting of whether four Justices would vote to hear the case and whether five Justices would be likely to reverse the case below is something which is not possessed of any mathematical certainty. If it is believed that the process has been miscalculated, a motion to vacate a stay addressed to the full Court is allowable. New Motor Vehicle Board of California v. Orrin W. Fox Company, 434 U. S. 1345 (1977)(REHNQUIST, J., in chambers). This is precisely the objective of the instant pleading.

Petitioner initially presented the Court with three grounds for staying his execution. The first was the much offered and litigated issue surrounding the prosecutor's closing argument. Noting the current struggle with the issue by the Eleventh Circuit Court of Appeals and the decision in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), petitioner claimed that what the prosecutor said over a decade ago now represents an Eighth Amendment violation. He contended that Caldwell, supra, established an entirely new standard of review for closing arguments vis-a-vis the Eighth Amendment and if that standard is applied to the facts in his case, he will conclusively demonstrate that he is entitled to relief. In response, we state that Caldwell v. Mississippi, supra, is not a closing argument case; it is a capital sentencing case involving the Eighth Amendment. Although the Eighth Amendment ramifications were established and developed by virtue of a statement made during a prosecutor's closing argument, the case has nothing to do with establishing any new standard of reviewing allegedly inflamatory and prejudicial remarks made during the guilt phase of a capital trial.

Regardless of what constitutional label petitioner attaches to the issue, the fact remains that the question of whether the prosecutor's closing argument deprived him of a fundamentally fair and constitutional trial has been carefully

reviewed and litigated by every single court available to him. This fact should weigh heavily against petitioner when considering a stay of execution of sentence, even if the sentence happens to be one of death. See, Bloeth v. New York, 369 U.S. 133 (1962) (HARLAN, J., in chambers), Rosoto v. Warden, California State Prison, 374 U.S. 202 (1963) (HARLAN, J., in chambers).

Moreover, in Maggio v. Williams, ___U.S. ___, 104 S.Ct. 311 (1983), a case which could be considered as presaging Caldwell, supra, JUSTICE STEVENS reviewed the remarks of the prosecutor and concluded that they were prejudicial because they misstated the law and may have led the jury to discount their grave responsibility in a capital case. Despite that conclusion, JUSTICE STEVENS noted that since the issue was raised in a prior proceeding questioning the competency of trial counsel--who failed to object to the argument when it was made--the Court was justified in applying a strict standard of review to the second federal habeas corpus application. 104 S. Ct. at 316, STEVENS, J., concurring. Here, just as there, there exists a failure to object to the allegedly inflamatory remarks of the prosecutor. Much more, the reason for the lack of objection is now known to have been a deliberate and tactical choice specifically made by trial counsel in an effort to create per se reversible error--that which is, and has been, petitioner's chief assertive position.

Having been unable to convince any court of the idea that he was deprived of a fair trial on guilt, petitioner now switches tack and offers the belief that remarks never held to be constitutionally improper somehow spilled over into the sentencing proceedings--a claim he must make in order to even remotely come under Caldwell's protection. Regardless of the current form of the claim, petitioner cannot escape the inevitable: the remarks deprived him of no constitutional right.

Petitioner also presents a basis for review which concerns the so-called Witherspoon issue. As this Court knows, the resolution of this issue by the Eleventh Circuit Court of

of Appeals was most recently done in direct response to this Court's remand. It cannot be seriously contended that the resolution of the Witherspoon issue was not done in absolute compliance with the principles announced in Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985).

There, this Court specifically held that the statutory presumption of correctness in 28 U.S.C., section 2254 (d), applies to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause. Given the requirement of deference required by Witt, when the trial judge in the instant cause told venireman Murphy that he would be excused, section 2254(d) was satisfied as the statement represented a finding of fact equivalent to or greater than the direction, "step down", in Witt.

Left remaining on this issue is consideration of whether the presumption of correctness is fairly supported by the record, viewed as a whole. To make this determination, it is first necessary to keep in mind the standard announced in Adams v. Texas, 448 U.S. 38 (1980) and reaffirmed in Witt: whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. In Witt, Juror Colby could only offer her thought that religious or personal beliefs might interfere with judging the guilt or innocence of the defendant. That brief exchange has been delcared by this Court to be: a factual finding of bias; a factual finding presumtively correct; a factual finding fairly supported by the record; and one applying the proper standard of law.

Comparing the colloquy in Witt with one in this case, it is noted that Colby offered her belief of possible interference without any consideration to the evidence which might be produced. Here, Murphy was asked about his principles in opposition to the death penalty which would be violated to the extent that he would be unable to vote to recommend the death penalty regardless of the facts. Colby was asked only about her general, religious or personal beliefs. Murphy was asked about

those principles, and others, and whether they were "so strong". Colby only thought her beliefs would interfere; Murphy was positive that his principles would be violated.

Does not the doing of an act which violates very strong moral, religious, or conscientious principles perfectly represent the "prevention or impairment" of a juror's duties in accordance with his instructions or oath? Though rhetorically posed, the answer to this question is unqualified "yes". Beliefs are synonomous with principles; "Yes" is more forceful than "I think so". Also, as in Witt, counsel for petitioner did not object to the excusal of Murphy nor was any further questioning apparently deemed necessary. While there many have been a continuing objection, it was one generally directed to the entire concept of excusing jurors who were in any way opposed to capital punishment. There was neither specific objection to the particular people who were excused on the grounds that they insufficiently demonstrated their opposition to capital punishment nor any effort to delve further into their views.

For the court of appeals to have decided the Witherspoon issue in any way than it ultimately did would have violated the principles of Witt and would have resulted in another vacation of judgment and remand for yet further consideration.

The third basis petitioner presented for relief was the allegation that counsel believed that Florida law restricted presentation of mitigating evidence to that enumerated in the statute. This particular claim is predicated on absolutely false information. On page 33 of the application, petitioner states that he was represented by Mr. Maloney, who had been licensed for four months, and who had never seen, much less tried a capital case. That is true. He says that there was co-counsel, a Mr. McDaniel, who had never tried a capital case. This is false and demonstrates the ends to which someone will go to avoid the imposition of sentence.

Mr. Maloney was nothing more than a legal intern in the public defender's office in 1974, and was assigned to assist Mr. Goodwill (McDaniel was the prosecutor). Maloney's

primary if not sole duty was to assist trial attorney, (HC 162), Mr. Goodwill (HC 166). We do not know why petitioner has attempted to continuously mislead courts in this regard, but if there is an opportunity to get the record straight, let it be now. Maloney was not petitioner's lawyer, he was the lawyer's helper.

The Public Defender of the Tenth Judicial Circuit, Jack Johnson, testified at the habeas corpus hearing that Maloney was assigned to be the assistant to Mr. Goodwill (HC 206). He appointed Goodwill as lead counsel because Mr. Goodwill had experience in capital cases (HC 221). Mr. Goodwill testified at that same hearing that he was admitted to the bar in 1965 (HC 273). In the time between his admission to practice and petitioner's trial he primarily practiced criminal law. In one year alone, he had thirteen or fourteen capital cases assigned to him (HC 279).

Maloney was called as a witness on behalf of Darden at the habeas corpus hearing for the purposes of opining that Darden received ineffective assistance of counsel in practically every conceivable manner, and to provide support for the serious and many charges of ineffectiveness leveled at Goodwill. While it is true that Maloney testified that no attempt to investigate or present evidence outside the statute was made, Goodwill, lead counsel, pointedly told Darden at trial that he had the absolute right to take the stand and tell the jury anything at all in mitigation (State trial record, vol. VIII p. 883). Goodwill knew of nothing he could have produced in mitigation, statutorily enumerated or otherwise. Goodwill did not feel limited, the trial judge was obviously not limited, and the absolute lack of merit in this claim is patently clear.

In dissenting from the denial of the application for stay of execution, JUSTICES BLACKMUN and STEVENS were of the opinion that a stay should be entered since the Court had not yet had an opportunity to review the denial of the first petition for federal writ of habeas corpus. A stay of execution would enable the Court to consider whether to grant certiorari

in the normal course of business. What may have been overlooked is the fact that when the court of appeals initially resolved the Witherspoon issue in petitioner's favor, the State of Florida sought and received a writ of certiorari on that issue. The remaining issues which were decided against Darden were made the basis of a cross-petition for writ of certiorari. It was denied by an apparently unanimous Court. Darden v. Wainwright, ___ U.S. ___, 104 S.Ct. 2688 (1984). Thus, the "opportunity to review the denial of applicant's first petition for federal habeas coprus..." was provided the Court in 1984. The cross-petition was filed in April of 1984 and denied in June of that same year. That period of time certainly suggests that consideration of whether to grant certiorari was conducted in the "normal course of business". It was the cross-petition which provided this petitioner with a right of review, the right which, it has been stated, every defendant in a state court of this Nation possesses. See, McDonald v. Missouri, ___ U.S. ___, 104 S.Ct. 567 (1984) (BLACKMUN, J., in chambers).

We presume that the basis of dissent shared by JUSTICES STEVENS and BLACKMUN is what carried over to the decision to grant the writ. In light of the above, it is respectfully suggested that the basis was non-existent. If so, then the rule-of-four was improvidently satisfied. Given these circumstances, it is respectfully suggested that reconsideration of the vote to grant certiorari is both prudent and necessary. The unique process which this case went through while in this Court represented yet another example of last minute activity which this Court has universally condemned. There should be little doubt that absolutely nothing had changed between petitioner's application for stay and his petition for writ of certiorari, save the label he attached thereto. To have once denied relief and then granted relief based on the identical pleading a few hours later is unique and unprecendented. On another occasion, JUSTICE POWELL has deemed the attempt at a similar enterprise as "the sort of procedure which undermines public confidence in the courts and in the laws which

we are required to follow". Stephens v. Kemp, ___ U.S. ___, 104 S.Ct. 562, 565 (1983) POWELL, J., dissenting.

To ultimately grant the writ in a case which has previously been before the Court on more than one occasion is one thing. To grant the writ in a case which five Justices have already determinedhas no chance of ultimate success is quite another. A rule-of-five should prevail over a rule-of-four. This is especially compelling since resolution of the issues appears headed towards a foregone conclusion.

We hope to have demonstrated that the writ was improvidently granted. Even if what we believe to be the factual predicate of the votes of JUSTICES STEVENS and BLACKMUN is incorrect, the announcement by JUSTICE POWELL that he perceives absolutely no merit in the claims should be sufficient motivation to reconsider the grant, and ultimately deny the writ. If this case proceeds to plenary review, the very most that will or can be accomplished, regardless of the ultimate ruling, is an adjudication of the respective rights of the litigants. There exists neither conflict nor important question of potential national application. In short, no question of federal law is in need of address by the Court.

Neither the writ nor the stay of execution should have been granted and based on the above, respondent respectfully moves dismissal and dissolution respectively.

Respectfully submitted,

Jim Smith
Attorney General

Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

Counsel for Respondent